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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1992

MAURICE RIVERS
AND
ROBERT C. DAVISON,

Petitioners,

V.

ROADWAY EXPRESS, INC.

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

1. Does the Civil Rights Act of 1991 apply to cases that were pending when the Act was passed?

2. Should this Court's construction of 42 U.S.C. § 1981 in *Patterson v. McLean Credit Union* be applied retroactively after it has been legislatively rejected by section 101 of the Civil Rights Act of 1991?

LIST OF PARTIES

The parties are the petitioners Maurice Rivers and Robert C. Davison and the respondent Roadway Express, Inc. James T. Harvis, Jr. was an appellant below in a separate appeal, his claims having been severed by the district court from those of Rivers and Davison and tried separately. Local 20, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America was a defendant in the district court, but the district court by order dated November 30, 1988 dismissed all claims against the defendant union, and that dismissal was not appealed. Neither Harvis nor Local 20 is a party to this petition.

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Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

Petitioners Maurice Rivers and Robert C. Davison respectfully pray that the Supreme Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on August 24, 1992. The Court of Appeals denied a timely petition for rehearing on October 13, 1992.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported as *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), and is set out at 1a-16a of the Appendix hereto ("App."). The order of the Court of Appeals denying respondent's petition for rehearing and for rehearing *en banc* is unreported and is

set out at App. 17a-18a. The opinion of the United States District Court for the Northern District of Ohio, Western Division, is unreported, and is set out at App. 19a-24a.

JURISDICTION

The decision of the Sixth Circuit was entered August 24, 1992. Respondent's timely petition for rehearing *en banc* was denied on October 13, 1992. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves sections 101, 109(c), 402(a) and 402(b) of the Civil Rights Act of 1991, 105 STAT. 1071, P.L. 102-166, which provide in pertinent part:

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended —

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 402. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

STATEMENT OF THE CASE

Petitioners Maurice Rivers and Robert C. Davison, experienced Black garage mechanics, seek *certiorari* on the issue whether section 101 of the Civil Rights Act of 1991 applies to their claims of race discrimination in employment against their former employer, Roadway Express, Inc. ("Roadway," "the Company"). Rivers and Davison worked successfully for Roadway from 1972 and 1973, respectively, until they were discharged in 1986. On August 22, 1986, without the contractually required prior written notice routinely provided to white employees, Roadway managers

told Rivers and Davison to attend disciplinary hearings on their accumulated work records. Both petitioners refused to attend because of the inadequate notice. Both were disciplined in their absence. They filed successful grievances complaining of the peremptory, racially discriminatory disciplinary proceedings. In retaliation for their success in the grievance proceedings, however, Roadway again convened disciplinary hearings, again without the requisite notice, and discharged the petitioners on September 26, 1986 after they refused to attend. App. 2a-3a.

The district court initially denied Roadway summary judgment on the race discrimination claims, but then dismissed petitioners' § 1981 discharge and retaliation claims based on this Court's subsequent decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). App. 23a-24a. The Court of Appeals for the Sixth Circuit reversed, and reinstated the claims of racially discriminatory retaliation. The Court of Appeals held that *Patterson* applies retroactively, but that the retaliation claims survive *Patterson* because § 1981 protects the right to "enforce contracts," and petitioners' "ability to enforce claimed contract rights was impaired because of their race." App. 8a. The Sixth Circuit thus remanded the retaliation claims for a jury trial, and directed a redetermination of the Title VII claims in light of the jury's verdict as required by *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). App. 9a-10a.

The Court of Appeals affirmed the dismissal of the claims of race discrimination in firing, however, on the ground that the Civil Rights Act of 1991 should not be applied to this case. App. 11a-14a. On remand under *Patterson*, as applied in this case by the Sixth Circuit, plaintiffs must prove race-based retaliation relating to their exercise of a contract right. App. 14a. If § 101 of the 1991 Act applied or if the decision in *Patterson* were held no longer to apply

retroactively, however, proof of race discrimination in any aspect of the employment relation would entitle the petitioners to relief.

Reasons For Granting The Writ

The question whether any provision of the 1991 Civil Rights Act applies to pre-Act claims has created a number of distinct conflicts in the Circuits. The Circuits are in conflict over whether the plain language of the 1991 Civil Rights Act commands its application to pending cases, because they disagree on the applicable rules of statutory construction. The Circuits are also in conflict over whether, if the statutory language is not determinative, the decisions of this Court create a presumption that § 101 of the Act applies. This conflict is so well developed that the Courts of Appeals have repeatedly expressly referred to it, and even requested clarification from this Court. Even among those courts holding § 101 presumptively inapplicable, there is a split over whether the question is properly analyzed as one of applicability of the 1991 Act as a whole, or whether it should be approached section by section. Finally, there is an unresolved question under this Court's own precedent whether, in light of the 1991 Act's repudiation of *Patterson*, that decision should continue to be applied retroactively to pending claims.

This case presents issues of great national importance. Hundreds of judicial decisions have grappled with the question whether the 1991 Act applies to pre-Act claims, and hundreds more have sought to apply the correct presumption regarding the applicability of other new statutes to pending

cases.[1] The conflicts in the law have led to inconsistent results among jurisdictions. Moreover, the United States government, in cases in the lower courts nationwide, is filing conflicting briefs, some supporting and other opposing a presumption that new legislation applies to pre-existing claims. If current experience is any guide, some civil rights cases filed prior to the 1991 Act will continue to be litigated for several years, and it is thus important for this Court to set forth clearly which legal standards will govern those cases.[2] The questions here presented must be resolved in order to ensure that the current inequities and waste of judicial resources not persist into the next decade.

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[1] Indeed, the Seventh Circuit in *Luddington v. Indiana Bell Telephone Co.* commented that the applicability of the 1991 Civil Rights Act was of such great importance that, even though it had already been decided by another panel of the Seventh Circuit, the *Luddington* panel would discuss it "as if it were an open question in this circuit, rather than, as we would ordinarily do, dispose of it with a citation to our recent decision." 966 F.2d 225, 226 (7th Cir. 1992).

[2] Employment discrimination cases unfortunately often take years to resolve. In the eight cases in which Supreme Court decisions were overturned by the 1991 Act, for example, the employment discrimination claim at issue was nine years old on average by the time the litigation reached this Court. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (plaintiff harassed 1972-1982, fired 1982); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 1642 (1989) (filed in 1974); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plaintiff denied partnership in 1982); *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991) (plaintiff dismissed in 1974); *Martin v. Wilks*, 490 U.S. 755 (1989) (original suit filed in 1974; disputed consent decree entered in 1981); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (seniority system adopted in 1979; plaintiff laid off in 1982); *West Virginia Univ. Hospitals v. Casey*, 111 S.Ct. 1138 (1991) disputed practice occurred in January 1986); *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (Title VII complaints filed in 1976 and 1977).

Other petitions for *certiorari* have already been filed with the Court addressing the applicability of various provisions of the Civil Rights Act of 1991 to pending claims. *Baker v. Gulf & Western* No. 92-552 (11th Cir., cert. petition filed September 24, 1992); *Johnson v. Uncle Ben's*, No. 92-737 (5th Cir., cert. petition filed September 29); *Landgraf v. USI Film Products*, No. 92-757 (5th Cir., cert. petition filed October 28, 1992); *Kuhn v. Island Creek Coal Co.*, No. 92-787 (6th Cir., cert. petition filed November 3, 1992). This case is the best vehicle for deciding the common issues for at least three reasons. First, the largest segment of pending cases in the lower courts raising the question whether the 1991 Act applies are cases seeking application of § 101.[3] That is the provision at issue here, but it is not addressed in *Landgraf* or *Kuhn*. Second, the court below, unlike the courts in *Uncle Ben's* and *Landgraf*, analyzed the applicability of the 1991 Act as a whole, rather than section by section. Given the importance of the procedural or substantive nature of the individual statutory provision at issue to the determination whether the change applies to pre-Act claims, the decision of the court below reviewing the Act as a whole specially warrants review. Third, petitioner in *Landgraf* seeks application of the procedures and remedies afforded by the 1991 Act to claims that were fully adjudicated prior to the Act under then-current procedures and remedies. This case was reversed and a remand directed on other grounds, and therefore will be retried in any event, and application of the

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[3] *See, e.g., Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir., 1992); *Gersman v. Group Health Ass'n., Inc.*, 975 F.2d 886 (D.C. Cir., 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir., 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225; *Mozee v. American Commercial Marine Svc. Co.*, 963 F.2d 929 (7th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 207 (1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992).

1991 Act's procedures and remedies is thus more appropriate here.

By separate motion, petitioners respectfully request that this petition be considered jointly with the petitions already filed in *Johnson*, *Baker*, *Landgraf* and *Kuhn*.

I. THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER THE LANGUAGE OF THE CIVIL RIGHTS ACT OF 1991 REQUIRES ITS APPLICATION TO CASES PENDING AT THE TIME OF ITS PASSAGE

The Sixth Circuit in this case, as well as the Fifth, Seventh, Eighth, Eleventh and District of Columbia Circuits, have ruled that the language of the 1991 Civil Rights Act does not indicate whether it applies to pending cases. *Harvis v. Roadway Express*, App. 12a (following *Vogel v. City of Cincinnati*, 959 F.2d 594, 597 (6th Cir. 1992) *cert. denied*, _ U.S. __, 113 S.Ct. 86 (1992)); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d at 1372-73 (5th Cir. 1992); *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d at 227 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1376 (8th Cir. 1992); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1992 WL 296716, at *1 (11th Cir., Oct. 20, 1992); *Gersman v. Group Health Ass'n., Inc.*, 975 F.2d 866, 888-890 (D.C.Cir. 1992). The Ninth Circuit disagreed, holding that "the language of the Act reveals Congress' clear intention that the majority of the Act's provisions be applied to cases pending at the time of its passage." *Davis v. City and County of San Francisco*, No. 91-15113, 1992 WL 251513 (9th Cir. Oct. 6, 1992). There is thus a conflict in the Circuits requiring resolution by this Court.

The conflict regarding whether the language of the 1991 Civil Rights Act by its terms applies to pre-Act cases

turns on basic rules of statutory interpretation generally applicable to all types of legislation. The issue thus has implications far beyond civil rights litigation, and sweeps more broadly even than the question of statutory retroactivity. The Circuits disagree over the continued viability of fundamental rules and methods of statutory construction.

A. There is a Circuit Conflict Over the Basic Rules for Construing Statutory Language

In determining whether the Civil Rights Act of 1991 applies to pre-Act claims, the Circuits arrived at diametrically opposing conclusions from the same statutory terms. The Ninth Circuit in *Davis* found dispositive the language of §§ 402(a), 402(b) and 109(c). Section 402(a), entitled "Effective Date -- In General", provides:

> Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

The *Davis* court examined the two statutory subsections that expressly do "otherwise specifically provide[]..." and confirmed by negative inference that § 402(a)'s mandate that the Act "take effect upon enactment" includes application to pending, pre-Act claims. One of the exceptions to the general applicability rule in § 402(a) is found in § 402(b), entitled "Effective Date -- Certain Disparate Impact Cases." Section 402(b) states:

> Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

Section 402(b) ensures that the Act shall not apply retrospectively to the *Wards Cove* case. The other exception to § 402(a) is § 109(c), entitled "Protection of Extraterritorial Employment -- Application of Amendments." Section 109(c) provides that:

> The amendments made by this section [§ 109] shall not apply with respect to conduct occurring before the date of the enactment of this Act.

Section 109(c) provides that the amendments giving the Act extraterritorial reach do not apply to pre-Act conduct.[4]

The Ninth Circuit in *Davis* found that the text of the 1991 Act is clear. The "directives from Congress that in two specific instances [§§ 402(b) and 109(c)] the Act not be applied to cases having to do with pre-Act conduct provide strong evidence of Congress' intent that the courts treat other provisions of the Act as relevant to such cases." *Davis*, 1992 WL 251513, at * 14. The court in *Davis* concluded that "[t]here would have been no need for Congress to provide that the Act does not pertain to the pre-passage activities of the Wards Cove company, see Section 402(b), or of American businesses operating overseas, see Section 109(c), if it had not viewed the Act as otherwise applying to such conduct." *Id.*

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[4] The Ninth Circuit also considered §§ 2 and 3, which include Congress' finding that *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), "has weakened the scope and effectiveness of federal civil rights protection," and Congress' desire to "codify the concepts of 'business necessity' and 'job related' enunciated in ... Supreme Court decisions prior to *Wards Cove*..." and to "respond to recent decisions of the Supreme Court ...." *Davis* 1992 WL 251513, at *14. According to the Ninth Circuit, these provisions show "Congress' sense that the Supreme Court had constricted the Nation's civil rights laws so as to afford insufficient redress to those who have suffered job discrimination," and therefore support application of the new Act to pending claims. *Id.* at *15.

In thus construing the 1991 Act, *Davis* applied the rule that "a statute should be interpreted so as not to render one part inoperative." *See Davis* 1992 WL 251513, at *14 (*citing South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n. 22 (1986), *quoting Colautti v. Franklin*, 439 U.S. 379, 392 (1979).[5] This well established principle was reaffirmed in *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) (holding that "a statute must, if possible, be construed in such a fashion that every word has some operative effect"). The other Circuits, however, including the court below, have declined to apply this rule, thus creating conflicts both among the Circuits and with this Court's clear mandate.

The *Davis* court also relied on the rule of construction that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Davis* at *14. (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983), *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). The other Circuits disregarded this rule in determining whether the 1991 Act applies to pre-Act claims and, again, are in conflict with the Ninth Circuit and this Court.

In disregarding the rules of statutory construction applied in *Davis*, each of the other Circuits that have considered the issue have not found the statutory language

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[5] For this proposition, the court in *Davis* also cited *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249-50 (1985) (*quoting Colautti*); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (*quoting Montclair v. Ramsdell*, 107 (17 OHO) U.S. 147, 152 (1883)); and *Beisler v. Commissioner of Internal Revenue*, 814 F.2d 1304, 1307 (9th Cir. 1987) (*en banc*).

conclusive. Some Circuits have simply disregarded §§ 402(b) and 109(c) without comment about the clear inference those sections create. The Sixth Circuit in *Vogel* did not consider §§ 402(b) and 109(c) in construing the statute, found § 402(a) alone insufficiently clear, and turned directly to the legislative history, which it found to be inconclusive. 959 F.2d at 598. The Seventh Circuit in *Luddington* did likewise. 966 F.2d at 227.

The Eleventh Circuit in *Baynes* did not specifically discuss *any* of the Act's language, but simply remarked that "[t]he Civil Rights Act of 1991 does not say whether it applies retroactively or prospectively." *Baynes*, at *1. *Baynes* thus appears to demand an express general statement using the words "prospective" or "retroactive" — a level of explicitness far beyond what this Court has previously demanded. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 838 (1990), the Supreme Court held that the plain language of the provision of the Federal Courts Improvement Act of 1982 that amended the federal postjudgment interest statute was on its face clearly inapplicable to judgments entered before its effective date. 494 U.S. at 838. The Court relied on (a) a statutory reference to the calculation of interest "from the date of the entry of the judgment....," 494 U.S. at 838, and (b) the reference to "*the* rate" and "*a* rate" of interest, *id.*, which the Court took to mean that a single rate should be applied, and that it should be the rate that was in effect on the date of entry of the judgment. *Id.* The inferences to be drawn from §§ 402(b) and 109(c) are more straightforward than those this Court in *Bonjorno* held were facially clear. In demanding a more express statement, *Baynes* represents a new approach to statutory construction inconsistent with this Court's own precedent.

B. There is a Circuit Conflict Over the Role of Legislative Language and History in Statutory Interpretation

In addition to the conflict among the Circuits about how to read the statute's plain language, the Circuits disagree over the role that legislative history plays in statutory construction. Several of the Circuits that found the text inconclusive did so by drawing on the admittedly unclear legislative history of the 1991 Act in order to inject some ambiguity into the statutory language. The Ninth Circuit in *Davis* followed this Court's recent pronouncement in *Bonjorno* that "[t]he starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language ordinarily must be regarded as conclusive.'" 494 U.S. at 835 (*quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). This Court just last Term in *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992), reaffirmed that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." The other Circuits, however, failed to apply this principle, thus generating an additional inter-circuit conflict.

The District of Columbia Circuit in *Gersman*, for example, rejected the statutory language argument that was determinative in *Davis* by drawing selectively on remarks in floor debates by legislators opposed to retroactivity, including Senators Dole, Danforth, and Gorton, and Representative Hyde. In light of such legislative history, the court in *Gersman* concluded that the language of the statute on its face was unclear, and "one might view these two subsections

[402(b) and 109(c)] not as redundancies, but rather as insurance policies." *Gersman*, 975 F.2d at 890.[6]

The court below considered § 402(a) in isolation, and held that it "could mean that the Act applies to pending cases or it could mean it should be applied only to conduct occurring as of that date of enactment." App. at 12a. In an approach similar to that of the District of Columbia Circuit in *Gersman*, the court then quoted at length from the Eighth Circuit's analysis in *Fray* of the legislative history to conclude that §§ 402(b) and 109(c) do not in fact have any independent significance, but are only "hedged ... bets" by the minority in Congress that opposed retroactivity. App. at 13a (*quoting Fray*, 960 F.2d at 1377).

Other Circuits, too, have responded to contentions that the statute on its face is clear by relying on legislative history to read ambiguity into the statute's terms. *E.g. Johnson v. Uncle Ben's, Inc.*, 965 F.2d at 1363 (holding that the express exceptions to applicability in §§ 402(b) and 109(c) do not clearly imply a general rule of applicability in § 402(a), "given the swirling confusion surrounding the Act's passage"); *Mozee*, 963 F.2d at 933 (holding §§ 402(b) and 109(c) inconclusive because the legislative history makes "fairly clear" that these sections were no more than "clear assurance" or

[6] Ironically, the *Gersman* court emphasized that "we do not inquire what the legislature meant; we ask only what the statute means," *id.* at 891, *quoting* Starr, *Observations about the Use of Legislative History*, 1987 Duke L. J. 371, 378 *quoting* O.W. Holmes, *The Theory of Legal Interpretation* in Collected Legal Papers, 207 (1920), because "it is only the statute itself that is law," *id.* Yet the court nonetheless did dig below the surface of the statutory language and drew on "snippets" of the legislative history to find ambiguities behind the otherwise clear message of §§ 402(b) and 109(c). *Id.* at 890.

"extra assurance" of prospective application in specified circumstances).[7]

In sum, the Circuits have taken conflicting approaches on the basic questions of interpreting statutory text, and of the proper role of legislative history in construing legislative terms. These questions are important, and they continue frequently to vex the lower courts. Seven Circuits have already addressed these issues in the context of the applicability of the 1991 Civil Rights Act, and their conflicting approaches call for resolution by this Court.

II. THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER NEW LEGISLATION, SUCH AS § 101 OF THE 1991 CIVIL RIGHTS ACT, SHOULD BE PRESUMED APPLICABLE TO PRE-ACT CLAIMS

A. There are Conflicting Presumptions Under *Bradley v. Richmond School Board* and *Bowen v. Georgetown University Hospital*

The Circuits are in conflict regarding the appropriate presumption to determine the applicability of new legislation to pending claims, and the Circuits identify conflicting decisions of this Court as the root of the confusion. The court below referred to "conflicting rules of construction" announced by this Court in *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). App. 11a-12a; *see Vogel*, 959

[7] Although the Seventh Circuit in *Mozee* asserts that the legislative history makes clear that § 402(b) and § 109(c) are only intended to provide extra assurance of the Act's nonretroactivity, the court paradoxically acknowledges that "[a] clear indication of congressional intent cannot be deciphered from the legislative history." 963 F.2d at 934.

F.2d at 597 (referring to Supreme Court doctrine on application of new legislation as "not yet settled"). *Bradley* held that a new statute applies to a pending claim "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. *Bowen*, on the other hand, stated that generally "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 488 U.S. at 208. This Court in *Bonjorno*, 494 U.S. at 828, referred to this "apparent tension" in the prior decisions, but did not resolve it because the statute at issue in *Bonjorno* was clear on its face.

Other Courts of Appeals have also expressly referred to a conflict in this Court's cases, and have struggled to apply the decisions in *Bradley* and *Bowen*. The Seventh Circuit in *Mozee* referred to "conflicting Supreme Court precedent," and to "two seemingly contradictory lines of cases." 963 F.2d at 934, 935. *See Luddington*, 966 F.2d at 227 (stating that "the courts do not have a consistent rule for deciding whether a statute shall be given retroactive, or merely prospective, effect when the statute does not say," and agreeing with Justice Scalia's observation in *Bonjorno* that the Supreme Court's rules are "in irreconcilable contradiction"). The Eighth Circuit in *Fray* agreed that the Supreme Court has established "two contradictory rules of construction." 960 F.2d at 1375. The Eleventh Circuit in *Baynes* similarly stated that this Court "has so far declined to resolve the conflict in its own rules on presumptions of statutory retroactivity." 1992 WL 296716 at *1. The Fifth Circuit in *Johnson* lamented being "[f]orced ... to choose a cannon of construction without the guidance of controlling authority...." 965 F.2d at 1473.

In the face of this conflict, some courts have simply made a choice to follow either *Bradley*, or *Bowen*. *See, e.g.*,

Landgraf v. USI Film Products, 968 F.2d 427, 432 (5th Cir. 1992) (holding under *Bradley* that § 102 of the 1991 Act should not apply); *Mozee*, 963 F.2d at 938, 940 (holding under *Bowen* that the 1991 Act should not apply); *Fray*, 960 F.2d at 1375, 1378 (referring to prior Eighth Circuit cases choosing to follow *Bowen* rather than *Bradley*, and holding that the 1991 Act should not apply under either presumption); *Baynes*, 1992 WL 296716 *2 (referring to prior Eleventh Circuit cases choosing to follow *Bradley* rather than *Bowen*, and holding that the 1991 Act should not apply under either presumption). Other courts have made attempts to reconcile *Bradley* and *Bowen* by identifying the distinct circumstances in which each applies. *E.g. Vogel*, 959 F.2d at 598 (holding that *Bradley* applies only when new legislation does not alter substantive rights); *Johnson*, 965 F.2d at 1374 (same); *Gersman*, 975 F.2d at 892-900 (same). *Certiorari* should be granted in this case because the Circuit courts need additional guidance from this Court on which presumption to apply.

The confusion in the law governing application of new legislation is also reflected in the fact that, of the Courts that have declined to apply the 1991 Act to pending claims, several have done so over strong dissents. See, e.g., *Mozee*, 963 F.2d at 940 (Cudahy, J., dissenting); *Fray*, 960 F.2d at 1379 (Heaney, J., dissenting); *Vogel*, 959 F.2d at 601 (Ryan, J., dissenting). Moreover, well over two hundred district courts cases around the country have used various rationale to reach conflicting decisions on the applicability of the same provisions of the Civil Rights Act of 1991 to pending claims. *See generally*, *Fray*, 960 F.2d at 1374, 1383-84 (referring to the confusion in the district courts, and appending a list of cases); *Vogel*, 959 F.2d at 598 (referring to split among the district courts).

The need for further guidance from this Court is also demonstrated by the fact that, in litigation to which it is a party, the United States has not taken a consistent position on whether *Bradley* or *Bowen* governs. In a confused and important area of the law, the lower federal courts might ordinarily look to the Department of Justice for principled guidance. Since this Court decided *Bowen*, however, the United States has varied its position from case to case, enthusiastically advocating application of the *Bradley* rule in some cases, then disavowing it in others. For example, in several recent briefs, the United States has asserted that "*Bradley* correctly states the law,"[8] describing the holding as "important," "well-established,"[9] "fundamental"[10] a "time-honored principle,"[11] "well settled," and the rule which "should control."[12] In these cases, government attorneys repeatedly quote the holding in *Bradley* that

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[8] Reply Brief of the United States to Opposition Briefs, *United States v. Allied Corp.*, Civil No. C-83-5898 FMS (N.D.Cal.) at 18.

The briefs cited herein are on file with this Court as Materials Lodged by Amicus NAACP Legal Defense and Educational Fund, Inc., accompanying the petition for *certiorari* in *Bailes v. United States*, No. 91-1075 *certiorari denied*, __ U.S. __, 118 L.Ed.2d 419 (1992).

[9] Response of the United States to Defendants' Motion to Strike Claims for Damages and Penalties, *United States v. Rent America*, No. 89-6188-PAINE (S.D.Fla.), at 23.

[10] Brief for Respondent, *Ayala-Chavez v. I.N.S.*, No. 91-70262 (9th Cir.), at 19.

[11] United States Reply to Defendants' Oral Motion to Dismiss, *United States v. Cannon*, Civil Action No. 6:91-951-3K (D.S.C.), at 4.

[12] Brief of Plaintiff-Appellant Federal Deposit Insurance Corporation, *Federal Deposit Insurance Corp. v. Wright*, No. 90-2217 (7th Cir.), at 26, 27.

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is legislative history to the contrary.[13]

Elsewhere, however, the United States has denigrated *Bradley* and the similar decision in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), as

> two exceptional Supreme Court decisions that conspicuously depart from the general and longstanding rule against retroactivity .... Nothing in the *Bradley* Court's reasoning compelled the conclusion that its broad language suggests ....
>
> * * *
>
> ["]It is significant that *not a single one* of the earlier cases cited in *Thorpe* and *Bradley* ... even *purports* to be applying a presumption of retroactivity.[14]

When the United States has decided to oppose application of a particular new statute to a pre-Act claim, it has repeatedly urged the lower courts to "choose *[Bowen v.] Georgetown* over *Bradley*," insisting that "*Georgetown* is the better

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[13] *See, e.g.*, United States Reply to Defendants' Oral Motion to Dismiss, *United States v. Cannon*, Civil Action No. 6:91-951-3K (D.S.C.), at 4, *quoting Bradley v. Richmond School Bd.*, 416 U.S. at 711.

[14] Defendant's Memorandum in Opposition to Plaintiff's Motion to File Second Amended Complaint, *Van Meter v. Barr*, Civil Action No. 91-0027 (GAG) (D.D.C.) at 14, 16 (emphasis in original) (quoting in part the concurring opinion of Scalia, J., in *Bonjorno*, 110 S.Ct. at 1584)

decision."[15] The inconsistent positions taken by the government from case to case underscore the national importance of the issues presented in this petition, and the need for a resolution of the conflict among the circuits.

B. There is a Conflict Over Whether Retroactivity is Determined by Reviewing the Act as a Whole or by Reviewing the Section at Issue

There is a separate conflict in the Circuits about whether the applicability of the 1991 Act should be analyzed with reference to the Act as a whole, or to the particular section sought to be applied. For example, the Fifth Circuit expressly limited its determinations in *Johnson* and *Landgraf* to the applicability of the particular sections before it; the court below, in contrast, held that the Act as a whole is inapplicable. Compare *Johnson*, 965 F.2d at 1372, 1374, and *Landgraf*, 968 F.2d at 432-33, with *Harvis*, App. 14a. *Johnson* expressly declined to consider "whether the Act's provisions affecting Title VII disparate impact claims are retroactive," because those provisions would have had no effect on Johnson's claims. 965 F.2d at 1372. The court then examined § 101 alone to determine whether it "affects substantive antecedent rights." *Id.* at 1374. *Landgraf* similarly looked separately at each provision at issue in that case to analyze whether its application would create "manifest injustice" under *Bradley*. 968 F.2d at 432-33. The Sixth Circuit in this case, however, held that the "distinction between § 101 [at issue here] and § 108 [at issue in *Vogel*] is immaterial, as both *Fray* and *Vogel* examined the retroactivity of the 1991 CRA *as a whole, not in terms of specific sections*, and both courts concluded that applying the Act retroactively

[15] Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distribution*, Nos. 91-3574, 92-1123 (8th Cir.), at 13, n.6.

would adversely affect substantive rights and liabilities." App. 14a (emphasis added).

The Court of Appeals decisions that analyze the applicability of the 1991 Act as a whole conflict with clear precedent from this Court requiring section-by-section analysis. In *Bradley* itself, this Court examined only § 718 of the Education Amendments of 1972, relating to attorney's fees, to determine whether any "manifest injustice" would be created by applying that particular provision to the pending case. *Bradley*, 416 U.S. at 710-724. The Court in *Bradley* did not consider the potential effects on pending cases of the entire 176 pages of statutory provisions included in the Education Amendments of 1972. See Pub. L. No. 92-318, 1972 U.S.C.C.A.N. (86 Stat.) 278-454. Similarly, this Court in *United States v. Security Industrial Bank* determined the inapplicability to pending claims of only § 522(f)(2) of the Bankruptcy Reform Act of 1978, even while it acknowledged the applicability of the balance of the amendments, on the ground that only § 522(f)(2) would "destroy previously vested property rights." 459 U.S. 70, 79 (1982). *Certiorari* should be granted here to review the decision below which erroneously determined the non-retroactivity of the 1991 Civil Rights Act as a whole.

III. Under This Court's Prior Decisions, The Construction Of 42 U.S.C. § 1981 In *Patterson v. McLean Credit Union* Should Not Be Applied Retroactively After Congress Expressly Rejected It

Certiorari should be granted to determine the proper application of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), to this case. The court below applied the *Patterson* decision retroactively to Rivers's and Davison's § 1981 claims

after *Patterson*'s construction of the statute had been repudiated by Congress. The decision below is thus contrary to this Court's decisions.

The common animating principle behind *Chevron* and the fractured opinions in *James B. Beam* is that a new, judicially announced rule should be promptly and uniformly applied because the new rule is the one which has been determined to be correct, and which will apply in all future cases. Application of a new — and therefore presumably correct — rule to pending cases advances the purposes behind the judicial new rule, and promotes prompt uniformity among judicial decisions. However, these considerations are inapplicable where the new judicial rule has been repudiated by Congress and will *not* be applied in the future. The effect of retroactive application of a judicial construction that Congress has rejected, such as *Patterson*'s interpretation of § 1981, is simply to ensure more inconsistent decisions and to perpetuate bad law.[16]

The propriety of non-retroactive application of new rules of decision has long been governed by the standard set forth in *Chevron*, 404 U.S. 97. This Court last Term in *James B. Beam* limited *Chevron* by holding that when a new rule of constitutional law is applied in the case announcing that rule, the rule must then also be applied retroactively to all other pending claims. *James B. Beam* did not overrule *Chevron*. Because there were five separate opinions in *James B. Beam*, and no plurality opinion, however, the precise scope of the

[16] This reasoning does not depend on a determination that the 1991 Civil Rights Act applies to pending cases. Rather, it rests on a more general notion that, to the extent that *James B. Beam* disfavors application of defunct rules to pending cases and insists on prompt application of new rules, that interest is subverted, not furthered, by anachronistic application of *Patterson*.

decision is unclear, as is the continuing role of *Chevron*. This case offers an ideal opportunity to refine the principles of *James B. Beam* and *Chevron*, and to clarify the circumstances in which each decision applies.

Because the Supreme Court's holding in *Patterson* interpreted 42 U.S.C. § 1981 and not the Constitution, the holding of *James B. Beam* is inapplicable here, and *Chevron* remains the test for determining retroactivity of *Patterson*. Justices Scalia, Blackmun and Marshall concurred in the judgment in *James B. Beam* in support of the retroactivity of a constitutional decision to the claim before them, but they did not support the broader reasoning of Justice Souter's opinion, nor reject the earlier holding of the *Chevron* case.[17] Only Justices Souter, Stevens, and White adhered to a general principle of retroactivity not limited to constitutional decisions.[18]

Even if *James B. Beam* applied to decisions regarding statutory as well as constitutional law, it should not apply to this case because *James B. Beam* did not involve the retroactive application of a rule of decision which has been subsequently repudiated by Congress. The test announced in *Chevron* thus applies here. The Court below, however, applied *Chevron* improperly because it failed to consider the impact of the 1991 Act on the retroactivity analysis.

[17] 111 S. Ct. at 2449 (opinion by Blackmun, J., joined by Marshall and Scalia, JJ., concurring in the judgment) (stating agreement only "that failure to apply a newly declared *constitutional* rule to cases pending on direct review violates basic norms of *constitutional* adjudication.") (emphasis added).

[18] 111 S. Ct. at 2442 (opinion by Souter, J., joined by Stevens, J.); *id.* at 2448 (opinion by White, J., concurring in the judgment).

The three *Chevron* factors strongly counsel against application of *Patterson* after Congress has rejected it. First, Congress' numerous references in enacting the 1991 Act to its desire to restore § 1981 to its pre-*Patterson* construction make clear that the decision "establish[ed] a new principle of law..." at variance with the prior construction of § 1981. *Chevron*, 404 U.S. at 106.[19] Second, the "purpose and effect" of *Patterson's* reading of § 1981, and the interest in "further[ing] ... its operation," *id.* at 106-107, do not support *Patterson's* retroactivity because there is no valid interest in perpetuating the operation of an obsolete rule by continuing to apply it retroactively after it has been expressly repudiated. Third, "the inequity imposed by retroactive application" and the mandate of *Chevron* to avoid "injustice or hardship," *id.* at

[19] Congress passed the 1991 Act "to respond to recent decisions of the Supreme Court...." § 3(4). The legislative history corroborates the plain language of the statute on § 101's restorative function. There was no disagreement by any member of Congress that legislation overturning *Patterson* would restore what until 1989 had been the established reading of § 1981. *See, e.g.* 137 Cong. Rec. S 15235 (daily ed. Oct. 25, 1991) (Sen. Kennedy) (section 101 "will reverse ... Patterson... and restore the right of Black Americans to be free from racial discrimination in the performance — as well as the making — of job contracts"); 137 Cong. Rec. S 15489 (daily ed. Oct. 25, 1991) (Sen. Leahy) ("The *Patterson* decision drastically limited section 1981's application.... The Civil Rights Act of 1991 returns the originally intended broad scope of this statute"); 137 Cong. Rec. H 9526 (daily ed. Nov. 7, 1991); (Rep. Edwards) (section 101 "reinstates" and "restores" law prior to *Patterson*); 137 Cong. Rec. H3900 (daily ed. June 4, 1991) (Rep. Goodling) ("[H.R.1] reverses ... the *Patterson* case.... [T]he substitute restores the expansive reading of Section 1981 that racial discrimination is prohibited in all aspects of the making and enforcement of contracts"); 137 Cong. Rec. H. 3935 (daily ed. June 5, 1991) (Rep. Goodling) (describing Administration proposal as "same provision" as the § 101 precursor in H.R. 1); 136 Cong. Rec. S 9851 (daily ed. July 17, 1990) (Sen. Kassebaum) (§ 101 codifies "the law as it was prior to *Patterson*"); 137 Cong. Rec. S 15285 (daily ed. Oct. 28, 1991) (Sen. Seymour) (Act "restores section 1981").

107, requires that *Patterson* not be applied. Accrued claims of racially discriminatory firing that were filed prior to the Supreme Court's decision in *Patterson* and that were ultimately decided after Congress rejected *Patterson* should not be eliminated simply because they were pending during the brief life of *Patterson*. Similar claims survived simply because they were decided earlier or arose later. *Certiorari* should be granted to review the decision of the court below because it applied *Patterson* retroactively without properly analyzing the impact of the 1991 Act on application of *Chevron* to this case.

CONCLUSION

For the reasons stated above, a writ of *certiorari* should issue to review the judgment and opinion of the Sixth Circuit.

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December 2, 1992

APPENDIX

Recommended For Full-Text Publication
Pursuant to Sixth Circuit Rule 24

No. 91-3348

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES T. HARVIS, JR.,	:	
	:	
Plaintiff,	:	
	:	
MAURICE RIVERS and ROBERT C. DAVISON,	:	
	:	
Plaintiffs-Appellants,	:	
	:	
v.	:	On Appeal from the United States District Court for the Northern District of Ohio
	:	
ROADWAY EXPRESS, INC.	:	
	:	
Defendant-Appellee.	:	

Decided and Filed August 24, 1992

Before: GUY, BOGGS, and SILER, Circuit Judges.

BOGGS, Circuit Judge, delivered the opinion of the court, in which GUY, Circuit Judge, joined. SILER, Circuit Judge (pp. 14-16) [14a-16a], delivered a separate opinion concurring in part and dissenting in part.

BOGGS, Circuit Judge. In this race discrimination case, the appellants originally claimed they were discharged because of racial discrimination and now state that the claim was also for retaliatory discharge for winning a grievance, exercised for racial reasons. The claim was dismissed by the district court based upon the United States Supreme Court ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). On appeal, appellants argue that the district court misapplied *Patterson*, but that even if their claim had been properly dismissed, this court should reinstate their claim by retroactively applying to this case the new Civil Rights Act of 1991 (CRA of 1991), Pub. L. No. 102-166, 105 Stat. 1071-1100, 42 U.S.C. § 1981, which explicitly enacted the interpretation of § 1981 rejected in *Patterson*. We reverse on the grounds that the district court misapplied *Patterson* to dismiss appellants' retaliatory discharge claim. We affirm the district court's dismissal of the race discrimination in firing claim, and hold that the CRA of 1991 should be not applied retroactively to this case.

I

Plaintiffs-appellants Maurice Rivers and Robert C. Davison are Black garage mechanics who were employed by defendant Roadway Express, Inc. since 1972 and 1973 respectively. On the morning of August 22, 1986, Roadway verbally informed Rivers and Davison that they were required to attended disciplinary hearings that same day related to their accumulated work record. Both plaintiffs refused to attend, alleging inadequate notice. Roadway was contractually required to provide prior written notice of such hearings and allegedly routinely did so for white employees. The hearings resulted in two-day suspensions for both appellants. Appellants filed grievances with the Toledo Local Joint Grievance Committee (TLJGC), which granted the grievances based on "improprieties" and awarded each appellant two days of back pay.

Shortly after these initial hearings, disciplinary hearings were again called by Roadway's Labor Relations Manager, James O'Neil, who announced that he would hold disciplinary hearings against Rivers and Davison within seventy-two hours. Rivers and Davison again refused to attend, claiming inadequate notice. As the result of the hearings, both Rivers and Davison were discharged on September 26, 1986, for refusing several direct orders to attend the hearings and for the accumulated work record.

In February 1987, Rivers and Davison, along with James T. Harvis, filed this suit, alleging that Roadway discriminated against them on the basis of race, in violation of 42 U.S.C. § 2000e. They also alleged that Roadway violated the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185(a), and brought an unfair representation claim against their union. Both of these latter claims were dismissed on summary judgment by the district court.

The district court then separated Harvis's case, which went to trial and ended in a jury verdict on the § 1981 claim for Roadway. The district court ordered judgment against Harvis on his § 1981 and Title VII claims. Harvis's appeal to this court was denied and the trial court's judgment affirmed. *Harvis v. Roadway Express, Inc.*, 923 F.2d 59 (6th Cir. 1991).

On June 15, 1989, shortly after Harvis's verdict and before appellants went to trial, the Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989), which held that the right to make contracts protected by § 1981 does not apply to conditions of employment, but only covers discrimination in the formation of the employment contract or the right to enforce the contract. The district court, while holding that *Patterson* was not retroactive with respect to Harvis's jury verdict, held it did have retroactive effect on the untried and pending

§ 1981 claims of Rivers and Davison. The district court concluded that appellants' claims were for discriminatory discharge and thus, based on *Patterson*, could not be maintained under § 1981. Rivers and Davison argued that their claims were not simply for discriminatory discharge, but rather for retaliation for their success in enforcing contract rights in a grievance hearing. However, the district court held that these were only basic breach of contract claims, and not claims based on the right to enforce contracts, which would fall under § 1981. After dismissing the § 1981 claims, the district court held a bench trial on plaintiffs' Title VII claims and ruled in favor of Roadway, holding that Rivers and Davison failed to establish that their discharge from employment was based upon their race.

Rivers and Davison appeal the district court's dismissal of their § 1981 claims on two grounds. First, they argue that *Patterson* does not preclude this action, as it is not an action for discriminatory discharge, but rather an action based on retaliation for attempting to enforce the labor agreement, thus squarely falling under § 1981. Second, while this appeal was pending, the CRA of 1991 was enacted, explicitly contradicting the *Patterson* decision. Appellants argue that the CRA of 1991 should be applied retroactively to their § 1981 claims, thus invalidating the district court's decision. The case, they argue, should be remanded for a new determination under this new legislation.

II

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of

> persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The *Patterson* court limited the scope of § 1981 actions by holding that § 1981 does not apply to discrimination in conditions of employment, but only prohibits discrimination in the formation of the employment contract or the right to enforce the contract. *Patterson*, 491 U.S. at 176. Thus, under *Patterson*, § 1981 "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Id.* at 179.

While *Patterson* did not directly address the issue of whether § 1981 applied to discriminatory discharges, this court, along with a majority of other courts, has held that claims of discriminatory discharge are no longer cognizable under § 1981 because discharge does not involve contract formation. *See Prather v. Dayton Power & Light Co.*, 918 F.2d 1255 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1991); *Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505 (6th Cir. 1991), *cert. denied*, 111 S. Ct. 2917 (1991). The plaintiffs, below and on appeal, argue that theirs were not discriminatory discharge claims, but rather, claims of retaliatory discharge where plaintiffs were punished for attempting to enforce their contract rights to be treated equally with white people. The district court rejected this claim as "bootstrapping" and held that this was solely a discriminatory discharge case.

Before deciding whether or not *Patterson* was correctly applied, we must first address whether the district court was correct in retroactively applying *Patterson* to the claims of Rivers and Davison. Our circuit has twice held that *Patterson* does apply retroactively to pending cases. In *Prather v. Dayton Power & Light Co.*, *supra*, we applied

Patterson retroactively to a pending discriminatory discharge case based on three factors used to determine whether an exception mandating nonretroactivity exists, as discussed by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Under these factors, a decision will not be applied retroactively if, first, it

> establishes a new principle of law, either by overruling clear past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Id. at 106 (citations omitted). The second retroactivity factor is the "prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 106-07. Finally, the third factor involves weighing "the inequity imposed by retroactive application" to avoid "injustice or hardship." *Id.* at 107.

Weighing these factors, the *Prather* court held that applying *Patterson* retroactively would not "retard its operation," nor would it produce "substantial inequitable results" that might otherwise be avoided and concluded that applying *Patterson* would not unduly prejudice the plaintiff. *Prather*, 918 F.2d at 1258. This decision was reaffirmed in *Hull v. Cuyahoga Valley Bd. of Educ.*, *supra*. The district court correctly found that *Patterson* applied retroactively to the pending § 1981 claims of Rivers and Davison.

III

Appellants argue that, even if *Patterson* is applied retroactively to their case, their claims still survive *Patterson* and the district court wrongly dismissed the claim as a discriminatory discharge complaint not recognized under § 1981. We agree.

Appellants contend that *Patterson* only eliminates those claims of retaliation for exercising rights that are unrelated to the specific § 1981 right to "make and enforce contracts." But, they argue, *Patterson* does not eliminate a cause of action for exercising rights that do relate to the enforcement of contract rights. Appellants maintain that they are not making discriminatory discharge claims, but rather are claiming retaliatory discharge that punished them for enforcing their contract right to receive notice equal to that received by whites.

Roadway counters that Rivers and Davison were not punished for enforcing their contract rights as

> The right to enforce contracts does not however extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

Patterson, 491 U.S. at 177-78.

However, the prohibited conduct of impairing the ability to enforce contract rights is exactly what appellants are complaining about here. Rivers and Davison were punished, they contend, for trying to utilize the established legal process for their grievances. The fact that Roadway allowed formal "access" to legal process does not imply that it could never be impairing the employee's "ability to enforce through legal process." An employer's intimidation and punishment conducted inside formal legal process may impair an employee's contract rights just as much as intimidation and punishment conducted outside formal legal process. *See Carter v. South Central Bell*, 912 F.2d 832, 840 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991) (court emphasized that the alleged conduct must have impaired the plaintiff's ability to enforce contractual rights either through court or otherwise on the basis of race).

Appellants' claims are similar to those in *Von Zuckerstein v. Argonne National Lab.*, 760 F. Supp. 1310, 1318 (N.D. Ill. 1991), where plaintiffs were permitted to proceed to trial on their § 1981 claims that "defendants specifically retaliated against them for pursuing (or intending to pursue) their *contract claims* in the internal grievance forum." *Id.* at 1318 (emphasis in original). We do not agree with appellee's argument that *Von Zuckerstein* is distinguishable because it involved an employer who impaired or impeded the plaintiffs from using the available legal process to enforce a specific anti-discrimination contract right. However, § 1981 speaks of the right to "enforce contracts," which includes any contract rights, not just anti-discrimination contract rights. The key here is that plaintiffs were impaired from enforcing contract rights, not the kind of contract right they were impaired from enforcing. Just because Rivers and Davison were allowed to use the available legal process does not mean the employer did not discriminate against them through retaliation for the very act of using that legal process. Retaliation is defined more broadly than mere access to legal process. *McKnight v. General Motors Corp.*, 908 F.2d 104, 111 (7th Cir. 199), *cert. denied*, 111 S. Ct. 1306 (1991), held that retaliation "is a common method of deterrence." We hold that appellants have articulated this essential element of § 1981, that their ability to enforce claimed contract rights was impaired because of their race.

Roadway argues that even if retaliatory discharge did occur, the plaintiffs never alleged retaliatory discharge in either their first or amended complaints. However, upon examination of the record, we find that sufficient allegations exist to form the basis of a retaliatory discharge claim. While appellants admit that their pre-*Patterson* complaint was not specifically structured as a "right to enforce a contract" claim as opposed to a "condition of employment" claim, the very basis of their complaint has always stemmed from retaliatory discharge. They allege, in their amended

complaint, that "Rivers' [sic] and Davison's discharges were taken without just cause. More particularly Roadway scheduled a hearing for them for September 26, 1986, based on conduct for which a grievance committee had previously exonerated them with backpay." We find that the appellants' claims fall within the *Patterson* definition of permissible § 1981 actions, as the claims involve discrimination in the right to enforce a contract. We hold that the district court wrongly dismissed appellants' § 1981 claims and the case should be remanded for further proceedings on the § 1981 claims.

Our holding that the case should be remanded for further proceedings on appellants' § 1981 claims raises potential collateral-estoppel problems. The district court has already had a bench trial on the appellants' Title VII claims, finding that Rivers and Davison were not discharged from employment based on their race.

A similar situation existed in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), where Lytle, a Black machinist for a subsidiary of Household Manufacturing, was dismissed for unexcused absences. Lytle filed a complaint with the EEOC, alleging that he had been treated differently than white employees who missed work. He then brought discriminatory discharge and retaliation claims under § 1981 and Title VII. The district court dismissed Lytle's § 1981 claims, concluding that Title VII provided the exclusive remedy for his racial discharge and retaliation claims. At a bench trial on the Title VII claims, the district court dismissed Lytle's discriminatory discharge claims pursuant to Rule 41(b), Fed. R. Civ. P., and granted defendants summary judgment on the retaliation claim.

The Fourth Circuit affirmed, ruling that the district court's findings with respect to Title VII claims collaterally estopped Lytle from litigating his § 1981 claims because the elements of a cause of action under § 1981 are identical to

those under Title VII. *Lytle*, 494 U.S. at 549; *see also Washington v. Brown & Williamson Tobacco Corp.*, 756 F. Supp. 1547, 1555 (M.D. Ga. 1991). The Supreme Court reversed, based on plaintiff's seventh amendment right to trial by jury in "suits at common law," noting that:

> When legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact."

Lytle, 494 U.S. at 550 (citations omitted).

The Supreme Court distinguished the *Lytle* situation, where the equitable and legal claims were brought together, from the situation in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), where the Supreme Court held that "an equitable determination can have collateral-estoppel effect in *subsequent* legal action and that this estoppel does not violate the Seventh Amendment." *Lytle*, 494 U.S. at 550-51 (citing *Parklane Hosiery Co.*, 439 U.S. at 335) (emphasis added).

We find that our situation falls squarely under the *Lytle* precedent and hold that collateral estoppel does not preclude relitigation of issues decided by the district court in its bench trial resolution of the equitable claims of Rivers and Davison under Title VII. As in *Lytle*, the purposes served by collateral estoppel do not justify applying the doctrine in this case. *Id.* at 553. Collateral estoppel is designed to protect parties from multiple lawsuits and potentially inconsistent decisions, as well as to conserve judicial resources. *Ibid.* Although remanding for further proceedings certainly will expend greater judicial resources, such litigation is essential in preserving Rivers's and Davison's seventh amendment rights to a jury trial.

V

While this case was pending on appeal, the United States Congress passed the Civil Rights Act of 1991. Appellants now argue that the district court should also be reversed in light of the 1991 Act, which amends § 1981 to change the result in *Patterson*. The 1991 Act states that:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Pub. L. 102-166, § 101(b); 42 U.S.C. § 1981(b).

Both this Circuit and the Eighth Circuit have addressed whether this act should apply retroactively to § 1981 claims that were pending on appeal at the time of enactment. Both circuits have ruled that the CRA of 1991 does not apply retroactively. *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992).

Both *Vogel* and *Fray* examine the history of judicial treatment of retroactivity as applied to new legislation. Building upon both Roman civil law and English common law, up to 1969 it was a well-established principle in American jurisprudence that legislation must be applied only prospectively unless the legislature specifically decreed a retroactive application. *Fray*, 960 F.2d at 1374. However, in *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969), and in *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974), the Supreme Court held that a new statute must be retroactively applied to a case that was pending on appeal at enactment "unless doing so would result in manifest injustice

or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711.

Later, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Supreme Court reiterated the principle that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires the result." *Id.* at 208. While the Supreme Court acknowledged this tension in the case law in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), the court did not have to resolve the issue, as congressional intent was found to be clear in that case.

Given these conflicting rules of construction, both the *Vogel* and *Fray* courts examined the language and legislative history of the CRA of 1991 and concluded that it should not be applied retroactively. For example, § 402 of Pub. L. 102-166 states that "[e]xcept as otherwise provided, this Act and the Amendments made by this Act shall take effect upon enactment." While appellants argue that this indicates retroactivity, the *Vogel* court correctly noted that this language could mean that the Act applies to pending cases or it could mean it should be applied only to conduct occurring as of that date of enactment. *Vogel*, 959 F.2d at 597-98.

Both the *Vogel* and *Fray* courts also agree that the legislative history sheds little light on the matter, as Senators expressed conflicting views and no legislative committee reports exist explaining the bill. *Fray*, 960 F.2d at 1376-77. Appellants argue that retroactivity is implied because two sections are expressly made prospective. However, the *Fray* court notes that a bill that specifically changes the result in *Patterson* retroactively was vetoed by the President in 1990 and Congress failed to override the veto. The court concluded that:

> We think a rather clear picture emerges from this review of the Act and its legislative history. Proponents of retroactively overruling *Patterson* commanded a majority in both houses of Congress, but they could not override the President's veto of a 1990 bill that contained express retroactive provisions. Thus, proponents could do no better than send an ambiguous law to the judiciary. On the other hand, opponents of retroactivity who favored enactment of a prospective law (including the President) were also willing to hand this controversial issue to the judiciary by passing a law that contained no general resolution of the retroactivity issue. However, when a congressional majority could be marshalled, retroactivity opponents "hedged their bets" by expressly making specific provisions, such as § 109, prospective only.

Fray, 960 F.2d at 1377.

Given the ambiguous legislative history and language of the act, this court held in *Vogel* that

> *Bradley* should be read narrowly and should not be applied in contexts where "substantive rights and liabilities", broadly construed, would be affected. Clearly, retroactive application of the 1991 Act would affect "substantive rights and liabilities" of the parties to this action.

Vogel, 959 F.2d at 598, citing *United States v. Murphy*, 937 F.2d 1032, 1037-38 (6th Cir. 1991).

Appellants argue that *Vogel* is not determinative here since it deals with § 108, which is written differently from

§ 101, the section at issue here. They also argue that the *Fray* opinion, which does deal specifically with § 101, is wrong. However, appellants' arguments are not well taken on either count. Their distinction between § 101 and § 108 is immaterial, as both *Fray* and *Vogel* examined the retroactivity of the 1991 CRA as a whole, not in terms of specific sections, and both courts concluded that applying the Act retroactively would adversely affect substantive rights and liabilities.

We agree with the *Fray* and *Vogel* decisions and hold that the 1991 CRA does not apply retroactively. However, as we also find that the district court misapplied *Patterson*, the case can be reversed on those substantive grounds alone. We REVERSE and REMAND for further proceedings under § 1981, as we hold that *Patterson* does not exclude § 1981 claims based on retaliation for attempting to enforce contract rights.

SILER, Circuit Judge, concurring in part and dissenting in part. I concur with the majority opinion in full, except that which is listed in part III. It is my opinion that *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), does not permit a claim for retaliation pursuant to 42 U.S.C. § 1981 under the facts of this case. It may be that *Patterson* precludes any retaliatory claims under § 1981, but this court need not go that far.

First, I have much more of a problem than the majority in determining whether the plaintiffs ever alleged retaliatory discharge in either their first or amended complaints. However, for purposes of this analysis, I will assume that they did.

The majority relies upon the decisions in *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Circ. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); and *Von Zuckerstein v. Argonne Nat'l Lab.*, 760 F. Supp. 1310 (N.D. Ill. 1991).

However, *McKnight* did not hold that § 1981 allows a claim for retaliation. Instead, it *assumed* that it was so actionable "provided that the retaliation had a racial motivation." *McKnight*, 908 F.2d at 111. Then, the court went on to find that the plaintiff in that case "*might* be guilty of violating section 1981." *Id.* at 112 (emphasis added). It further stated that the question need not be pursued, "because General Motors did not interfere with *contractual* entitlements." *Id.*

Moreover, the court in *Von Zuckerstein* held at 1319 that the plaintiffs in that case would have to establish "that they sought to use the internal grievance procedure to vindicate their contractual right to be free from discrimination." That is unlike the present case, which apparently does not have an antidiscrimination provision in the collective bargaining agreement.

Instead, I would follow the decision in *Carter v. South Cent. Bell*, 912 F.2d 832, 840 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991), which held that § 1981 no longer extends to retaliatory termination. Although that case is somewhat different from this one, in that the plaintiff asserted that he was retaliated against because of filing a charge with EEOC, which was a statutory right, not a contractual right, nevertheless, the court stated:

> Were we to hold that section 1981 still encompasses retaliatory discharge, we would be encouraging litigation to determine what the employer's subjective motive was when he fired the employee: was it to retaliate or "merely" to discriminate? This would be pointless. Both motives are equally invidious, and the employee suffers the same harm. Because section 1981 no longer covers retaliatory termination, all suits for discriminatory dismissal must be brought under Title VII.

Id. at 840-841. *Accord Overby v. Chevron USA, Inc.*, 884 F.2d 470, 472-473 (9th Cir. 1989), cited with approval in *Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Educ.*, 926 F.2d 505, 509 (6th Cir.), *cert. denied*, 111 S. Ct. 2917 (1991), for the proposition that retaliatory discharge claim is conduct not cognizable under § 1981.

Moreover, this court has, by unpublished decisions, followed that rule from *Carter*. Although they have no precedential value, see Sixth Cir. R. 24(c), they were cited by Roadway Express in its brief. I am not inclined to completely ignore opinions of other judges on this court, even if they are not binding. In *Christian v. Beacon Journal Publishing Co.*, No. 89-3822, 1990 U.S. App. LEXIS 12080 (6th Cir. July 17, 1990) (unreported), the court held that claims of retaliatory discharge may not be brought pursuant to § 1981 under *Patterson*, citing *Singleton v. Kellogg Co.*, No. 89-1073, 1989 U.S. App. LEXIS 17920 (6th Cir. Nov. 29, 1989) (per curiam) (unreported). *See also Bohanan v. United Parcel Serv.*, No. 90-3155, 1990 U.S. App. LEXIS 20154 (6th Cir. Nov. 14, 1990) (unreported) (Wellford, J., concurring). Therefore, I would affirm the district court in all respects.

[Dated Oct. 13 1992]

No. 91-3348

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES T. HARVIS, JR.,	)	
	)	
Plaintiff,	)	
	)	
MAURICE RIVERS;	)	
ROBERT C. DAVISON,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	**ORDER**
	)	
ROADWAY EXPRESS, INC.,	)	
	)	
Defendant-Appellee.	)	

BEFORE: GUY, BOGGS, and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and

decision of the case. Accordingly, the petition is denied. Judge Siler would grant rehearing for the reasons states in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

[Dated Jan. 19, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

James T. Harvis, Jr., et al.,

Plaintiffs

Case No. C 86-7955

vs.

Roadway Express, Inc., et al.,

Defendants

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the Court on plaintiffs' response to the Court's show cause order of July 10, 1989, defendants' reply, and plaintiffs' surreply. This Court's order of July 10, 1989 ordered plaintiffs to show cause why their claims brought pursuant to 42 U.S.C. §1981 should not be dismissed pursuant to the Supreme Court's decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

The current posture of the case is such that a jury returned a verdict finding no violation of §1981 against plaintiff James Harvis. Two days later, on June 15, 1989, the Supreme Court decided *Patterson*. Defendants contend that the *Patterson* decision should not apply retroactively to Harvis' §1981 claim. Plaintiff, however, argues precisely the opposite. The *Patterson* decision should, according to plaintiffs, be applied retroactively to Harvis' claim, thus depriving the Court of subject matter jurisdiction on Harvis'

§1981 claim. Plaintiffs contend that the Court must as a result disregard the jury verdict rendered on Harvis' §1981 claim and make its own findings of fact and conclusions of law with regard to Harvis' 42 U.S.C. §2000e et seq. claim. Thus, the first issue before the Court is what effect the *Patterson* decision must be given regarding Harvis' §1981 claim.

The parties have correctly pointed out that judicial decisions involving statutory interpretation are generally applied retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). However, under certain circumstances it is appropriate not to apply a decision retroactively. The *Chevron* court set forth a three-part analysis to be used in determining the nonretroactivity question. The court stated:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principal of law, either by overruling clear past precedent on which litigants have relied [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted]. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking at the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." [Citation omitted.] Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [Citation omitted.]

Id. at 106-107.

This Court has applied *Patterson* retroactively to cases pending before it. See, e.g., *Haynes v. The Salvation Army*, No. 3:89CV7115 (N.D. Ohio Aug. 22, 1989) and *Hernandez v. AP Parts Co.*, No. C88-7797 (N.D. Ohio Aug. 22, 1989). However, those cases did not involve the factual scenario of the case sub judice since no jury verdict had been returned yet on the §1981 claims. Thus, the relevant question is whether the fact that a jury rendered a verdict on Harvis' §1981 claim should preclude a retroactive application of *Patterson*. At least one other district court considered this issue in light of the *Chevron* nonretroactivity analysis and concluded that equity disfavors the retroactive application of Patterson to a §1981 claim tried to a verdict before a jury. *Gillespie v. First Interstate Bank of Wisconsin Southeast*, 1989 U.S. Dist. LEXIS 8150 (E.D. Wisc. 1989). The Court agrees that to apply *Patterson* to §1981 claims tried to a verdict before a jury would yield an inequitable result to the prevailing party, whether it be plaintiff or defendant. Accordingly, *Patterson* does not apply to Harvis' §1981 claim and the jury verdict on the claim survives *Patterson*.

When a party has a right to a jury trial on an issue involved in a legal claim, the court is bound by the jury's determination of that issue as it relates to an accompanying equitable claim. *In re Lewis*, 845 F.2d 624, 629 (1988). Clearly, both 42 U.S.C. 2000e et seq. (Title VII) and 42 U.S.C. §1981 require proof of purposeful discrimination on the part of a plaintiff in order to prevail. *Daniels v. Board of Educ. of Ravenna City School District*, 805 F.2d 203, 207 (1986). In the case of Harvis, a jury found that intentional discrimination based on race was not a factor in his discharge. Pursuant to *Lewis*, this Court is bound to follow

that determination with respect to Harvis' Title VII claim and enter judgment in favor of defendant. The Court is persuaded that final judgment should be entered on Harvis' claim pursuant to Rule 54(b). Harvis' claims are dissimilar to those of Rivers and Davison and thus there is no just reason for delay in entering judgment on Harvis' claims.

The second issue before the Court is whether the §1981 claims of plaintiffs should be dismissed pursuant to *Patterson*. It should be noted that the Court concludes, pursuant to the Chevron analysis, that *Patterson* should be applied retroactively to the §1981 claims of Rivers and Davison since they have not yet been tried to a jury.

Defendants [sic: Plaintiffs] Rivers and Davison have pled in essence that their discharges were racially motivated and thus violated §1981. However, in Patterson the court held as follows:

> By its plain terms, the relevant provision in §1981 protects two rights: "the same right . . . to make . . . contracts" and "the same right . . . to . . . enforce contracts." The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a

> contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII. See *infra*, at __.

Patterson, 109 S. Ct. at 2372-73. Since the *Patterson* decision, this Court and others[1] have concluded that §1981 does not apply to discriminatory discharges since a discharge is conduct which occurs after the formation of a contract.

Finally, although plaintiffs Rivers and Davison contend that they were discharged in retaliation for exercising their grievance procedure rights, the Court is not persuaded that the complaint continues to state a claim upon which relief can be granted in light of *Patterson*. Other district courts have considered similar issues and concluded that claims that a plaintiff was discharged in retaliation for exercising rights still protected under §1981 do not state a claim under §1981 in light of *Patterson*. *Dangerfield, et al. v. The Mission Press*, 1989 U.S. Dist. LEXIS 8985 (N.D. Ill. 1989) (holding that a retaliatory discharge for filing EEOC complaint was no longer actionable under §1981); *Hall*, 1989 U.S. Dist. LEXIS 9661 (N.D. Ill. 1989) (holding that discharge for complaints about discrimination not actionable). In this case plaintiffs Rivers and Davison contend that they were discharged in retaliation for prevailing in a grievance hearing. However, such a "bootstrapping" of the actual breach of contract claim into a claim that plaintiffs were deprived of the right to enforce the contract was rejected in *Patterson*. *Id.* at 2376. Plaintiffs concede that "the claim of denial of access to those

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[1] See *Williams v. National Railroad Passenger Corp.* 1989 U.S. Dist. LEXIS 8859 (D. D.C. 1989); *Hall v. County of Cook*, 1989 U.S. Dist. LEXIS 9661 (N.D. Ill. 1989); *Haynes, supra*; *Hernandez, supra*.

[grievance and judicial] forums is not the claim here." Plaintiffs' Reply at 6. Ironically, the denial of access to such forums is precisely what is protected under the "right to . . . enforce contracts" provision of §1981. Plaintiffs Rivers and Davison have been free to grieve or litigate their discharges in the appropriate forums. Thus, their complaint fails to allege that they have been deprived of their §1981 rights. Accordingly, the §1981 claims of Rivers and Davison will be dismissed.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that judgment be, and hereby is, entered in favor of defendant on plaintiff Harvis' 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981 claims; and it is

FURTHER ORDERED that the 42 U.S.C. §1981 claims of plaintiffs Rivers and Davison be, and hereby are DISMISSED.

/s/ John W. Potter
United States District Judge